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In the

Supreme Court of the United States

OCTOBER TERM, 196[redacted]7

No. [redacted]

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR. d/b/a BROWN FOOD STORE; TOOTIE SCHNAUBERT d/b/a CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; ARNOLD CRABB d/b/a THRIFTY WAY FOOD STORE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (See Petition, Appendix A., pp. 12-21) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 4-12, 20-27)[1] are reported at 137 NLRB 73.

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[1] "R" refers to the Transcript of Record in the court of appeals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals erred in denying enforcement of a Board order predicated upon a finding that the use of temporary replacements by members of multi-employer bargaining group following and during a legal lockout constituted discriminatory conduct and a violation, *per se*, *of* Section 8 (a) (3) and (1) of the National Labor Relations Act, as amended, notwithstanding the fact that there is no record evidence that in using such temporary replacements any Respondent was guided by any anti-union motivations.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are set forth in the Petition, Appendix B, pp. 22-23.

STATEMENT

A. Statement of Facts

The facts as set forth in the Petition (See Petition, pp. 2-4) and opinion of the Court of Appeals (Petition, App. A, pp. 12-14) are correct. Respondents, however, because of the Board's finding of discrimination within the meaning of the Act, stress the fact that prior collective bargaining contracts had contained a union shop provision and that

at the time of the strike herein the parties had agreed to all portions of the new contract except wage increases and retroactivity of wage increases (R. 41-42). Moreover, there is no record evidence and no Board finding that any respondent has at any time, either prior to or during the strike and lockout, uttered a single word or engaged in a single act that indicated any anti-union animus. Indeed, past relations between the union and respondents have generally been very good (R. 41).

B. The Board's Findings and Conclusions

The Board majority, Chairman McCulloch and Members Leedom and Brown, in adopting the trial examiner's findings, concluded that "the initial lockout by the nonstruck employers was a permissible defensive measure to protect the solidarity of the multiemployer unit under the rule of *Buffalo Linen Supply Company*.[2] The Board majority, however, further concluded, as did the trial examiner, that by continuing to operate even on a makeshift basis during the period of the strike and lockout, the nonstruck employers discriminated in regard to the hire and tenure of employment of their locked-out employees to discourage membership in the union in violation of Section 8(a) (3) and (1) of the Act, and the lockout was thereby rendered unlawful. (R. 21).

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[2] *N.L.R.B. v. Truckdrivers Local 449 (Buffalo Linen Supply Company)*, 353 U.S. 87, affirming 109 NLRB 447.

In *Buffalo Linen*, the Board held in effect that the resulting lockout was a legitimate defensive means of protecting the integrity of the multiemployer bargaining unit against the disintegration threatened by the whipsaw strike. It is noted that only Member Rodgers, who dissented herein, was a member of the Board in 1954 when it rendered its opinion in *Buffalo Linen*.

C. The Decision of the Court of Appeals

The Court of Appeals, in agreeing with the dissenting Board members, denied enforcement of the Board's order on the ground that the majority view "renders largely illusory the right of lockout given them by the Supreme Court in *Buffalo Linen*" (Petition, App. A, p. 17). The Court concluded:

> "We do hold that the Board has erred in its interpretation of *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike. *NLRB v. Insurance Agents Union*, 361 U.S. 477, 80 S. Ct. 419, 4 L.Ed. 454".

ARGUMENT

A. The Decision of the Court of Appeals is Clearly Correct.

The pattern of conduct in the instant case, prior to respondents' attempts to continue operating, is closely analogous to that in *Buffalo Linen*. In either instance, there was a history of collective bargaining on a multi-employer basis; a bargaining impasse during negotiations for a new contract; a whipsaw strike against one member of the employer group; and, a lockout by other employers in the bargaining unit.

This Court in *Buffalo Linen* quoted, with apparent agreement, the Board's conclusion that the lockout was permissible because "the strike against the one employer

necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association, with the 'calculated purpose' of causing 'successive and individual capitulations'." As this Court further noted, the Board's opinion in *Buffalo Linen*, 109 NLRB 447, held that " 'in the absence of any independent evidence of anti-union motivation * * * the Respondents' (sic) action in shutting their plants until termination of the strike was defensive and privileged in nature, rather than retaliatory and unlawful'."[3] As stated by this Court, [A]lthough the Act protects the rights of the employees to strike in support of their demands, *this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide.*"[4]

Notwithstanding its finding here that the initial lockout was lawful under the rationale of *Buffalo Linen*, the Board majority concluded, without any "independent evidence" on which to base such finding, that the subsequent use of temporary help "constitute[d] a temporary replacement of employees solely because they were engaging in protected concerted activity" (R. 22-23).

As pinpointed by the dissenting opinion of Members Rodgers and Fanning:

> "The portion of the statute here involved speaks of *discrimination:* to find a violation of Section 8(a) (3), some form of *discrimination must be found.* The only conceivable discriminatory action in the present case,

[3] Quoted at 353 U.S. 91.
[4] 353 U.S. 96. Emphasis added.

> the association-wide lockout, has been found privileged by the Supreme Court. To 'infer' unlawful discrimination, as does the majority, from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the discrimination inherent in the original lockout was privileged." (Emphasis added) (R. 25-26).

Yet the record herein is devoid of any independent evidence of discrimination or unlawful motivation on the part of any respondent. The Board majority, notwithstanding the explicit requirements of Section 10 (e) and (f) of the Act, and *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 774 (1951), that its findings be predicated upon "substantial evidence on the record considered as a whole," has resorted to the simple expedient of finding a *per se* discrimination. This the Board cannot properly do under the facts of this case.

In *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), this Court clearly struck down the simple expedient of the *per se* finding. Therein this Court stated; at 676:

> "Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. NLBR v. Drivers, Chauffeurs, Helpers, etc., 362 US 274, 284-290, 4 L ed 2d 710, 718-721, 80 S Ct 706. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme."
>
> "Its power, so far as here relevant, is restricted to the elimination of discrimination * * * the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected

> to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it."

The separate concurring opinion of Justices Harlan and Stewart in *Teamsters Local 357*, in further explication of the decisions, states, at 680:

> "In general, this Court has assumed that a finding of a violation of § 8(a) (3) or § (b) (2) requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity. See, e.g., NLRB v. Jones & L. Steel Corp., 301 US 1, 45, 46, 81 L ed 893, 916, 57 S Ct 615, 108 ALR 1352; Universal Camera Corp. v. NLRB, 340 US 474, 95 L ed 456, 71 S Ct 456. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exception made to the requirements for a showing of discrimination in other contexts."

See also *N.L.R.B. v. Dalton Brick and Tile Corp.*, 301 F. 2d 886 (CA 5, 1962).

In the instant case, the Court below correctly concluded:

> "The crux of the Board decision here is premised upon an ultimate finding of unlawful intent, based upon indicia appearing from the uncontaminated course of conduct of respondents in hiring replacements * * * Can it be reasonably inferred that the act of hiring replacements, *per se*, is 'retaliatory' rather than 'defensive'? We think it cannot and hold that the Board in so doing has misinterpreted and misapplied the principles set forth by the Supreme Court in *Labor Board v. Truck Drivers Union (Buffalo Linen)*, 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 2676, and *Labor Board v. Mackay Radio & Tel. Co. (Mackay)*, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

In this case the Board majority has wholly failed to perceive and apply the doctrine of "self help" that this

Court alluded to in *Buffalo Linen*. Indeed, the Board majority has equated the respondents' good faith "self-help" efforts to operate their respective businesses and protect their perishable inventories with "retaliatory" and anti-union motivations.

The "self-help" rationale of *Buffalo Linen* is applicable here. Respondents have done nothing but resort to minimum "self-help" by calling on supervisors, relatives of management and a few temporary employees to keep their stores in limited operation in order to protect their perishable inventories and capital investments and service the food needs of the community of Carlsbad. Had respondents displayed anti-union animus or engaged in conduct interdicted by the Act, the decision of the Board majority might be given more weight. But, the locked-out employees were told that they would be returned to work when the strike was over and their welfare and other employment benefits were maintained during the strike and lockout.

The Board majority decreed that if members of a multi-employer bargaining unit attempt to save their group from the atomization resulting from whipsawing tactics by locking out employees, the lockout *must be* complete and the doors to the business closed. Any attempt to remain open by utilizing temporary help is construed to be, *per se*, an unlawful discriminatory replacement of employees solely because they were striking one of the members of the multi-employer unit. The Board majority refused, therefore, to discuss or concern itself with the potential economic catastrophe flowing from a sudden cessation of

business. What are some of the possible results? First, under the facts at hand, it appears that the community as a whole would have suffered from the lack of an adequate food supply. Aside from supplying the community with food, a closing of the stores would in this case have necessitated the layoff of the respondent's various meat department employees who were not covered by the contract in question and therefore were not engaged in the dispute. The same reasons which permit the lockout must likewise permit, at least to the extent here attempted, the continued operation of the business enterprises. Here the majority attaches no significance whatsoever to the fact that the union and its members were physically striking the multi-employer association in an attempt to force its members to capitulate to the union's demands.

The Court below points with accuracy at the Board majority's basic misapplication and misunderstanding of the rationale of this Court's decision in *Buffalo Linen*. As stated by the Court below (Petition, App. A, pp. 17-18):

> "The impact of the Board's decision is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike the struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantages passes to the struck

> member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*. To the contrary, *Buffalo Linen* recognizes that a lockout is justified in order to assure the preservation of the integrity of the multi-employer bargaining unit. It is no answer to say that the respondents could have remained in operation through retaining their regular employees. This merely denies the privilege of lockout and, through denial, refuses any consideration of the existence of the overriding business purpose which, as recognized in Labor Board v. Erie Resistor Corp., supra, may justify the invasion of union rights. The preservation of the multi-employer bargain unit, approved as it is by congressional consideration and judicial decision, is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not."

The alternative suggested solutions to respondent's dilemma set forth at pp. 8 and 9 of the Petition clearly reflect the Board's continued failure to grasp the economic realities of whipsaw picketing tactics. The Petitioner offers as an alternative the suggestion that "the employer members of an association who have not been struck can keep all members of the association 'in the same boat' either by shutting down entirely, or by curtailing their business and laying off roughly the same percentage of their normal complement of workers as the struck employer is lacking, or if the struck employer has resumed full operations, by resuming business as usual." These suggestions either fail to perceive or wholly ignore the "self-

help" rationale of *Buffalo Linen*, and the right to protect the integrity of the multi-employer bargaining unit. First, it is simply impossible to completely shut down a retail grocery operation which necessarily maintains a large inventory of perishable merchandise. Second, there is obviously no economic parity between an employer who is attempting to operate a store while being picketed by a union and an employer who is not being picketed. Under the Board's reasoning, the union would be in a position, depending on the particular circumstances, to give a favored employer an economic advantage by its method of picketing. The suggestion in the Petition that the employers could lay off "roughly the same percentage of their normal complement of workers as the struck employer is lacking" (Petition, p. 9) would force the employer to make an inherently discriminatory selection as to which employees to lay off because of union activities. The Petitioner does not offer any suggestions as to how such a selection is to be made in situations where all of the employees in the unit may not be union members and the employer does not know which employees are in fact members of the union.

Perhaps, as pointed out in the dissenting opinion of Members Rodgers and Fanning (R. 26), the "majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the discrimination inherent in the original lockout was privileged." Nonetheless, this Court there unequivocally held that, absent other acts proscribed by the statute, the lockout was "defensive and privileged in nature rather than retaliatory," and that respondents therein had the

right to resort to "self help." Respondents submit that in attempting to continue to operate their individual stores they engaged in conduct purely "defensive and privileged," rather than "retaliatory." Moreover, respondents urge that their conduct constituted reasonable "self-help" dictated by the strike action calculated to "atomize" their bargaining unit[5] and the economic pressures resulting from such strike action.

Regardless of the Board's impression of this Court's decision in *Buffalo Linen*, the rationale of that decision renders the lockout herein legal. As stated in the dissenting opinion of Members Rodgers and Fanning (R. 25):

> "Granting that the employers' initial lockout was permissible, as the Supreme Court has held, it seems clear that temporarily replacing the employees for the duration of the strike did not further their union status or union adherence, particularly since the employees in this case were expressly told by Respondents they would have their jobs at the end of the strike. The discrimination, if any, took place at the point of initial lockout, and the Supreme Court has held this to be privileged in the whip-saw situation. How can the performance of a nondiscriminatory act make unlawful something which was theretofore privileged."

It would seem to follow, as stated by the dissenting Members, that, the lockout being legal, "Temporary replacement of the employees in strike status was well within

[5] See *Morand Bros. Beverage Co. v. NLRB*, 190 F. 2d 576 (1951), wherein the Court of Appeals for the Seventh Circuit concluded that where a member of a multi-employer bargaining unit was struck, the other members "could quite properly and realistically view the strike, as they did, as a strike which, though tactically against one petitioner, was in the strategic sense, a strike against the entire membership of the Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union."

the employers' rights under Mackey," wherein this Court declared it permissible for an employer to replace striking employees in an effort to carry on his business. *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

This Court in *Mackay* stated, at page 345:

> "There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations. * * * On the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union. Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikes."

Here the employees in the bargaining unit were engaged in a strike, actual or constructive, against the multi-employer group, with a view to furthering their demands for a new contract. Thus, these employees were thereby placed in strike status or a status substantially similar to strikers.

The lockout herein being privileged and respondents having the right to employ "self help," the Board is without authority, either under the Act or by legal precedent, to "pick and choose which economic devices of labor and management shall be branded as unlawful." As stated by this Court in *National Labor Relations Board v. Insurance Agents*, 361 U.S. 417 at page 489, 80 S. Ct. at page 427:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. * * * (T)he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each make the other party incline to agree on one's terms—exist side by side. * * * But as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."

While it is true that this Court in *Buffalo Linen* stated that "The functions of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review," this Court's later decision in *Insurance Agent's, supra*, removes any possible doubt that Board decisions, to be valid, must be based upon the exercise of the limited powers granted by the Act and supported by substantial evidence on the record considered as a whole.

B. There is no Conflict of Decision

The issue presented herein is novel and the Court below is the first court to issue a judicial opinion on the matter. Respondents submit that this issue should be reserved until such time as there is a conflict in opinions of the circuit courts of appeal.

C. There Is No Important Question of Federal Law

Notwithstanding the plea of importance that the Petition seeks to attach to this case, the immutable fact is that this is the first time in the twenty-eight-year history of the Act the issue has been raised. Respondents therefore respectfully submit that if the issue is truly an important one it will undoubtedly be raised again in the future, in which event another court of appeals will have a chance to study the problem.

CONCLUSION

Respondents respectfully urge that the opinion of the Court below is correct and, for the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, William L. Keller, one of the attorneys for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of November, 1963, I served copies of the foregoing Brief for Respondents in Opposition to the Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit by air mail, postage prepaid, on the Hon. Archibald Cox, Solicitor General, Department of Justice, Washington 25, D.C.

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